

Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

NYNEX / Teleport Arbitration)	D.P.U. 96-73/74
NYNEX / Brooks Fiber Arbitration)	D.P.U. 96-75
NYNEX / AT&T Arbitration)	D.P.U. 96-80/81
NYNEX / MCI Arbitration)	D.P.U. 96-83
NYNEX / Sprint Arbitration)	D.P.U. 96-94

**INITIAL BRIEF OF
TELEPORT COMMUNICATIONS GROUP, INC.
ON
NON-PRICING CONTESTED ISSUES**

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INITIAL BRIEF OF TELEPORT COMMUNICATIONS GROUP, INC. ON NON-PRICING CONTESTED ISSUES

I. PRELIMINARY STATEMENT

Following the interconnection negotiations between TCG and NYNEX, only one major non-price issue remains outstanding: the standards of service performance to be required of NYNEX, and the applicable penalties in the event NYNEX fails to comply with those standards. This issue is of critical importance to both TCG and other competing carriers which either interconnect with NYNEX or utilize its unbundled service elements, particularly unbundled links and private line circuits.

II. THE NEED FOR PERFORMANCE STANDARDS

There are two conceptual levels of performance: the absolute level of performance in providing a facility or service (such as the time it takes to install a new circuit) and the relative performance, which compares the time it takes NYNEX to install or repair a circuit for its own customers to the time it takes to install or repair the comparable circuit for TCG. Both of these standards should be of concern to the Department, but special attention is needed to relative performance in order to preclude anti-competitive conduct.

Consider, for example, a situation where a new customer can choose between NYNEX and TCG for local exchange service. If the customer calls NYNEX, it will be quoted a standard service interval, perhaps six or twelve days. Alternatively, the customer can contact TCG, which, because it obtains the underlying facility from NYNEX, cannot quote a service interval to the customer in a shorter time frame than NYNEX quotes to TCG for installation of that circuit. If NYNEX offers an installation interval of twenty days to TCG, TCG will be unable to provide that service to the customer as quickly as NYNEX could provide directly. In those circumstances, the customer is likely to choose NYNEX as its carrier.

There is no technical or engineering reason why NYNEX should take longer to install a circuit for its competitor, compared to installation of the same circuit for its own customer. As John Kelley, Director of Operations for TCG in Boston points out, the facilities are the same, and the same cables and pieces of fiber are used. There is no difference "between what NYNEX provides to their own customer and what NYNEX provides to my customer over those facilities." (October 25, TR 89/1). The motivation for delayed installation to a competitor, however, is clear.

The likelihood of such delayed installations is far from theoretical.

John Kelley described the significant difficulties TCG was having in obtaining timely service installations from NYNEX. That difficulty was graphically demonstrated by Exhibit 11 to TCG's October 4 position paper (in evidence as part of TCG-1).¹

Exhibit 11 lists four types of circuits which TCG obtains from NYNEX in Boston: Switch,² DS-3, T-1 and DS-0.

The information provided for each of the four categories of orders includes the total number of jobs, the number of Firm Order Commit (FOC) dates due to TCG (corresponding to the number of jobs), the number of FOCs received on time, the number of FOCs received late, the average interval between transmission of the order and the receipt of the FOC date, and the percentage of FOCs received on time.³ Exhibit 11 also shows NYNEX's

¹ Exhibit 11 shows results for the month of August, 1996. However, it is representative of service results for all of 1996 (October 25, TR 71/4).

² "Switch" represents carrier-to-carrier connections, such as interconnection trunks. The other categories are facilities provided by NYNEX to TCG, which TCG resells in the same basic form to TCG's end users.

³ When TCG places an order with NYNEX, the first response from NYNEX is a FOC, or Firm Order Commit date. The FOC is the date for which installation of the service is actually promised. The FOC interval is the time between NYNEX's receipt of an order from TCG and the date it transmits back to TCG the expected installation date. NYNEX's internal standard for responding back to TCG with a FOC date is 48 hours, and Exhibit 11 shows the FOC as having been received "on time" or "late" depending upon whether NYNEX responds in that 48 hour period.

The FOC date is independent of the actual installation date. As an example, TCG may order a circuit on the 1st of the month, with a FOC date due back on the 3rd. When the FOC is eventually received, there will be an installation date given, which may be 10 days in the future. The last five columns on Exhibit 11 show NYNEX's experience with meeting the promised installation date.

experience in actual meeting the installation date promised.

As can be seen from Exhibit 11, NYNEX's overall performance in Boston for on time provision of the FOC is only 17.83%. Even worse is the fact that only 6.40% of orders were actually installed within the time promised.

As Mr. Kelly explained, receiving a FOC date is extremely important to TCG in its business operations, because TCG quotes its own customers due dates based upon that FOC, i.e., how long it will take NYNEX to provide the facilities to TCG (October 25, TR 72/7).

The standard installation dates are six days if NYNEX has facilities available, and twelve days if there are no existing facilities (October 25, TR 72/7). These dates run from receipt of the TCG order into the NYNEX computer system, not from the date which NYNEX provides a FOC.

Since NYNEX's on-time percentage for delivery of service within the six or twelve days is only 6.4%, TCG cannot quote the standard six day/twelve day intervals which NYNEX can quote to its own customers. Accordingly, it is easy for a customer to conclude that it will obtain speedier service if it is taken from NYNEX, not a competitor.

As Mr. Kelly put it, if TCG could not provide service in the same time frame as NYNEX:

"...The customer would just turn around and say, 'why would I do business with you if you're offering the same services and NYNEX can provide it faster?'" (October 25, TR 76/1).

Mr. Kelly had repeatedly experienced this phenomenon. One case which stood out involved a customer in Watertown, where TCG applied for service from NYNEX in

March, and received a due date for the middle of April. No service had been provided by May, and the frustrated customer finally cancelled its order with TCG. Amazingly - or perhaps not so - the customer received service the next day directly from NYNEX (October 25, TR 74/9).

TCG believes NYNEX should be required to provide adequate, reliable and timely service to all customers, whether they be direct customers of NYNEX or a competitor such as TCG which utilizes facilities leased from NYNEX. It is important, however, to recognize that two types of standards are necessary.

The first would relate to services or elements that NYNEX provides to TCG, for use by TCG in providing services to its own customers; these were characterized by Mr. Montgomery as "intermediate goods". As input to the competitive process, standards applicable to those intermediate goods can be distinguished from standards for certain retail services that regulators have maintained around the country.

There may, for example, be a standard for a single business line which NYNEX provides to its retail customer. There is not likely to be, however, a comparable standard for installation of a high-capacity DS-3 circuit.

The standards to be set forth should not be absolute and immutable, but should also not be subject to unilateral change. Initially, those standards should be established at what NYNEX provides to itself and its larger customers; that standard will be deemed to be just and reasonable, and will not move up or down at the whim of either party. However, the standard will not be unchangeable in the event that NYNEX, on its own (or pursuant to regulatory directive) changes the standard by improving service to itself or its larger customers. To that

extent, the principle of parity requires that NYNEX extend to TCG any improvement in service levels it voluntarily undertakes or is required to undertake by regulatory directive.

Once the appropriate absolute service standards are established, it is critical that parity between NYNEX's treatment of its own customers, and NYNEX's treatment of TCG, be maintained. TCG therefore believes the arbitration agreements should require that NYNEX provision, install, maintain, repair and monitor all services, interconnection facilities, unbundled elements, collocation elements and all other interconnection arrangements, facilities and services, at the same level of quality which NYNEX provides to itself. Similarly, NYNEX should be required to provide to TCG the same level of transmission quality, reliability, maintenance, repair, installation, and other service characteristics, including reporting of results, which it provides to any other party, whether pursuant to written agreement or informal or formal practice.

A competitor's entitlement to parity is granted by the Telecommunications Act of 1996. Specifically, §251(c) requires incumbent local exchange carriers to provide interconnection to a requesting telecommunications carrier on terms that are "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection" (§251(c)(1)(C)) and "on rates, terms and conditions that are just, reasonable and non-discriminatory..." (§251(c)(1)(D)).

A similar requirement exists for the provision of unbundled elements, with each incumbent local exchange carrier having the duty to provide to any requesting telecommunications carrier "non-discriminatory access to network elements on an unbundled

basis at any technically feasible point on rates, terms and conditions that are just, reasonable and non-discriminatory..." (§251(c)(3)).⁴ See also 47 CFR §51.305.

Assurance of such parity requires that accurate records be kept by NYNEX of its actual performance for itself and other parties, and that such results be provided to TCG for its review. Only then will TCG (and other competitors) be able to determine whether or not they are receiving comparable service.

This need for parity was also addressed by MCI's witness Kevin Moss, whom commented on NYNEX's disincentive to provide service to its competitors on a par with the service it provides to itself:

"Because NYNEX's customers in this instance are also NYNEX's competitors, NYNEX has every incentive to provide unbundled elements, resell interconnection and other ancillary services to its competitors at an inferior level to what NYNEX provides to its own business units in order to defeat potential competition for NYNEX's own customers...Accordingly, NYNEX should be required to do two things, first, NYNEX should be required to make clear the level of service they offer to themselves today, and these standards of parity should be included in the contract so that MCI knows what service it should expect to receive, and second, NYNEX should be required to measure its performance against these measures for itself, for MCI and for other CLECs, so that MCI knows that it is indeed receiving the level of service agreed to and that this level of service is at least at parity."

(Rebuttal Testimony of Kevin Moss, October 18, 1996, p. 3 - Exhibit MCI-5).

In response, NYNEX asserts it is willing to give parity to its competitors. But

⁴ This standard requiring equal treatment is more stringent than the traditional statutory prohibitions against unreasonable discrimination or unreasonable references. See, §§201 and 202 of the Communications Act of 1934.

like so many things, parity is in the eye of the beholder.

What NYNEX is offering is to give TCG and other CLECs parity with the service standards established for average NYNEX customers. Thus, for example, if the average standard for installation of a business line is ten days, NYNEX is amenable to providing service to the CLEC in that same ten day time frame. Adoption of that standard, however, would create a giant loophole (no pun intended).

The principle reason for this is that NYNEX does not treat all of its customers equally. Recognizing the importance of its largest business customers, NYNEX has established a special organization known as the Business Customer Service Center (BCSC) which serves its top 100 revenue producing customers. Each customer served by that office has an assigned account executive and a service account manager. By virtue of their size, and revenue potential, those customers get preferential treatment (October 25, TR 75/2).

Thus, for example, while the service standard for the average customer might be ten days, because of the favored treatment received by large business customers, they might be able to expect service in five days. If NYNEX were obligated to provide service to Teleport in ten days (matching its average customer standard), while standing ready to provide service to its large business customers in half the time, the disincentive for customers to do business with TCG becomes apparent. This is particularly true for business customers whose service orders are often extremely time sensitive. Any discrimination of this type would, as a practical matter,

exclude TCG from this critical market segment.⁵

While the discussion thus far has focused on parity in terms of service installation, the same requirement for parity (and an appropriate absolute performance standard) is required with respect to other types of service such as repair. Even if service is installed for TCG's customers in the same time frame as a NYNEX customer, NYNEX's providing special attention to its own customers, or its prompt repair of their service outages with a less-than-committed response to service outages on facilities serving TCG customers, would have the same devastating impact in the marketplace. Faced with an actual or threatened deterioration in service, or an actual or threatened delay in having service restored, customers would be highly unlikely to choose TCG or another competitor.

Accordingly, to assure parity in all aspects of service provided by NYNEX, detailed record keeping by performance category and type of service (including the information shown on Exhibit 9 to TCG-1) is necessary. Furthermore, comparable information must be prepared by NYNEX with respect to service provided to (1) its internal network clients, (2) any NYNEX affiliates, (3) NYNEX's largest carrier customers (cumulatively), and (4) NYNEX's ten largest commercial customers (cumulatively). Without identifying particular customers,

⁵ Again, it is critical that parity be established with NYNEX's actual experience, not its outside standard for delivering service. As indicated, NYNEX may establish an outside due date for installation of a particular service for its own end-users. However, if NYNEX actually betters this standard for its own customers, and installs service in a shorter time frame, providing service to a competitor within the established outside date is not acceptable. Thus, the required reporting, discussed further below, should not only indicate compliance with the established standard, but also the actual experience in delivering service to various categories of users.

NYNEX must be required to provide a complete comparison of its service activities for each of those categories of service, and each type of customer, on a quarterly basis.

To the extent that NYNEX provides quality and performance reports directly to any of its customers, NYNEX must stand ready to provide the same type of quality and performance reports to TCG, specifying as to TCG's services the same types of information, and at the same intervals, that NYNEX provides to its own customers.

It is also important that, to the extent NYNEX reaches any agreement with other carriers, whether they be CLECs or interexchange carriers, notice of those standards must be made available to TCG. Just as a competitor would be harmed if NYNEX provides favorable treatment to one of NYNEX's own customers vis-a-vis the competitor, so too would that competitor be harmed if NYNEX provides a higher standard of service to a different competitor.

Because TCG does not have access to all of the agreements which NYNEX may reach with other carriers, and may not have knowledge of their details, it is necessary to require NYNEX to advise TCG about such arrangements in order to ensure that the non-discriminatory requirements are satisfied. TCG is willing to accept reasonable confidentiality limitations on such information.

Alternatively, NYNEX could be required to report all its service performance criteria for all categories of customers and interconnectors, and the degree to which it complies with such criteria, to the Department and to all competitors with which negotiated or arbitrated interconnection agreements exist. That reporting would be consistent with the FCC's

expectations as set forth in paragraph 311 of the Interconnection Order:

"311. We agree with those commenters that argue that incumbent LECs should be required to fulfill some type of reporting requirement to insure that they provision unbundled elements in a non-discriminatory manner...We encourage the states, however, to adopt reporting requirements."

NECESSITY FOR PENALTIES

Setting forth standards would be ineffective unless a realistic mechanism existed for their enforcement. That is why self effecting penalties for failure to meet the performance standards should be set forth in the arbitrated agreements.

Regardless of what incentives or disincentives NYNEX may have with respect to an absolute level of service, marketplace incentives exist for NYNEX to fail to deliver adequate service to its competitors. Whether such failure takes the form of delayed installations or delayed repairs, to the extent that competitors suffer in the eyes of their customers, NYNEX stands to benefit materially.

As described by TCG witness W. Page Montgomery:

"I think there should be a reasonable set of penalties for NYNEX...The reason you need penalties, I think, is for two reasons. First the organization of the industry that we're coming to is going to be based on contractual arrangements between providers, with regulatory agencies taking care of people who are not covered by contracts and setting broad policies that those contracts should adhere to. That's going to be enough, I think, to keep regulators busy for a number of years to come. I don't think its wise for the regulator to try to take on the specific dispute resolution task that would be required if these penalties were left to some sort of adjudicated regulatory proceeding." (October 25, TR 81/24).

As indicated by Mr. Montgomery, achieving relief in the form of a complaint to the regulator will not be sufficient to assure that NYNEX complies with performance standards. The regulatory process is slow, and it could take many months, if not years, before regulators (either state or federal) exercise what limited authority they may have to impose penalties. In the meantime, the competitor will be forced to incur significant litigation expenses, as well as a diversion of its employee and management resources, in order to participate in extensive regulatory proceedings. And, even if penalties were to be assessed months or years after the event, those penalties would most likely be either in the form of limited "out of service credits" or be paid to the general state treasury; they would not be paid to the competitor which suffered the economic loss because of NYNEX's failure to provide adequate service.

It is the consequences of NYNEX's failure to provide adequate service which need to be addressed in these arbitrations. If NYNEX fails to provide timely installation or repair, a competitor may lose that client's business entirely, thus suffering significant economic damages. Receipt of service credits for extra days out of service will not come anywhere near compensating the competitor for the economic damages it will suffer.

The insignificance of any out-of-service credit on NYNEX⁶ will actually be counter productive in assuring that it provides adequate service. The revenues NYNEX stands to gain by having customers leave a competitor and return to its own service (or never taking

⁶ Out of service credits traditionally apply only to already installed service, and are inapplicable to service which has not yet been provided (as would be the case for delayed installation).

competitive service in the first place) will greatly outweigh any regulatory fine or out-of-service credit which might be imposed on NYNEX. If the penalty is but a few dollars, and the potential gain is many thousands in additional revenue, NYNEX will not be motivated to comply with the established standards.

Penalties are motivators. They will only be effective to the extent that they are large enough to outweigh the benefits of the conduct they seek to prevent.

In this regard, the "liquidated damages" portion of the agreement between NYNEX and MFS, which limits potential damages to \$75,000, is grossly inadequate, and in fact provides very little incentive for NYNEX to provide timely and adequate service to its competitors.

TCG's specific penalty proposal is set forth in Exhibit 6 to the original TCG arbitration petition.⁷ That proposal does not assess "line-by-line" penalties, such as a specific fine each time NYNEX fails to meet an installation or repair standard. Instead, it is based on the overall performance of NYNEX in providing service to its interconnecting competitors.

Specifically, as set forth in the last three pages of that Exhibit 6, TCG proposes tracking of NYNEX's actual performance on a quarterly basis. TCG will "grade" the service provided to TCG compared to service which NYNEX provides to itself or to other customers. To the extent that NYNEX's service to TCG is inadequate, a staging of penalties applicable to all services ordered by TCG in a quarter would be applied.

⁷ A motion to have that document marked and admitted into evidence was forwarded to the Arbitrator on November 8.

The specific penalties proposed for Total Performance which fails to meet

standards is as follows:

Penalty Matrix for Total Performance<1

<u>Consecutive Quarters</u>	<u>Penalty</u>
1	0
2	10%
3	25%
4	45%
5	70%
>5	100%

Application of penalties in this manner is the only way to assure that NYNEX receives the proper incentive to provide just, adequate and reasonable service to interconnecting companies free from anti-competitive conduct.

STANDARDS MUST BE ESTABLISHED FOR ALL SERVICES

NYNEX generally agrees that performance/service standards are appropriate (New England Telephone and Telegraph Company submission on "Other Issues", October 4, 1996). For links and ports, NYNEX proposes to use performance criteria as set forth in the NYNEX/MFS agreement. However, for other unbundled elements with which NYNEX claims it has "no market experience", such as unbundled local switching and unbundled network element combinations, NYNEX proposes only to establish "a period for monitoring and reviewing the actual marketplace experience" without setting forth standards. That approach is unacceptable.

It may take many months before such "monitoring and reviewing" produces any results. Even then, it will only measure NYNEX's experience in delivering service in conformance with its self selected "due date", which offers no objective measure of service quality. For example, should NYNEX establish a wholly unreasonable standard of providing unbundled switching elements, and, six months from now the results show NYNEX met its "standard", the report will show 100% success. But that number will be meaningless if the self-selected installation standard is unreasonably long, which may very well occur in light of the competitive benefits NYNEX can achieve by delaying service to its competitors.

Competitors cannot await many months or years before critical standards are established, and before penalties relating to appropriate standards are enforced. Accordingly, the time to establish performance criteria for all unbundled elements is now.

TCG does not accept NYNEX's claim that it has no experience in providing these unbundled elements. NYNEX now provides those elements to itself as part of the normal process of provisioning service to NYNEX's end users. While the functions associated with providing those elements to competitors may not be exactly the same as NYNEX's providing those service elements to itself, the functions are sufficiently close that NYNEX's existing internal service provisioning standards can be used.

INCENTIVES FOR PROVIDING SUPERIOR SERVICE

The arbitrator has asked parties to address whether NYNEX should be entitled to

receive incentives for exceeding established service standards, to go hand in hand with penalties for failing to meet those standards. As a general rule, TCG does not believe such incentives are appropriate.

The most critical factor is to establish a reasonable service standard that meets the needs of customers and competitors, and is reasonably attainable by NYNEX through use of an appropriate dedication of resources. That standard becomes a benchmark which all segments of the industry can use in planning for the ordering and delivery of service. In many cases, exceeding that standard is neither necessary nor appropriate.

For example, if the standard service interval for a new line is six days, and NYNEX uniformly meets that standard for both itself and its competitors, there may be no reason, in the normal situation, why more expeditious delivery of service would be sought. In many cases, the actual in-service date depends not only on the work to be done by NYNEX, but also work to be done by the competitor and the customer itself. Thus, if NYNEX initially quotes a six day service interval, the competitor and the customer may not be prepared to take service from NYNEX within three days. In this situation, certainty is as critical as the absolute performance standard.

There may, of course, be some situations where all parties seek service on an expedited basis. To the extent that the standard service interval is reasonable, and to the extent that NYNEX would incur additional costs in providing expedited service on request, NYNEX may be entitled to additional payment for its services. That approach would be consistent with the long-standing tariffed practice of offering expedited installations at premium installation

rates. TCG believes that approach is appropriate, provided that the standard service interval is reasonable on its own, so that every order need not be placed on an expedited basis.

III. CONCLUSION

Of the many non-price issues which have been addressed by interconnecting parties in their negotiations, performance standards and penalties are amongst the most critical. Effective competition cannot develop if the incumbent is able to use its monopoly power to favor its own customers over potential customers of competitors. The only way to assure even-handed treatment, and the provision of just, adequate and non-discriminatory service to all segments of the telecommunications industry, is to establish meaningful performance standards, and appropriate penalties,

in the arbitrated agreements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day served the Initial Brief of Teleport Communications Group, Inc. on Non-Pricing Contested Issues upon the parties listed on the attached service list in accordance with the requirements of 220 C.M.R. Section 1.05 of the Department's Procedural Rules. Service was made by Federal Express, for delivery on November 13, 1996, except where otherwise indicated.

Dated at Albany, New York this 12th day of November, 1996.

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